

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARIO CANODY,

Petitioner,

No. CIV S-04-1168 FCD KJM P

vs.

SCOTT KERNAN, Warden, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He challenges his 1999 Sacramento Superior Court conviction for robbery with the use of a weapon and the resulting “three strikes”-based sentence of forty-one-years-to-life. Respondent has filed a motion to dismiss, alleging that the case is duplicative of the action already pending in Canody v. Director, Department Of Corrections, Civ. No. S-03-2296 GEB JFM P, and that it was not filed within the AEDPA statute of limitations.

The instant petition contains four challenges to petitioner’s conviction: (1) denial of the right to a speedy trial under California Penal Code section 1382; (2) denial of the right to a line-up before the preliminary hearing; (3) ineffective assistance of counsel, based on counsel’s

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1 failure to assert petitioner's right to a speedy trial or adequately argue the motion for a line-up;
2 and (4) prosecutorial misconduct based on the prosecutor's use of petitioner's prior convictions
3 to ask petitioner to admit he was a thief.

4 In the previously filed action, which is still pending, petitioner challenges the
5 same Sacramento Superior Court conviction on the same grounds as in the instant case. See Am.
6 Pet., Canody v. Director, Department of Corrections, Civ. No. S-03-2296 GEB JFM P (docket
7 no. 5).

8 In light of the prior action, the instant petition is duplicative and must be
9 dismissed. Fed. R. Civ. P. 12 (f).

10 Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to
11 dismiss be granted.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
14 days after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
17 shall be served and filed within ten days after service of the objections. The parties are advised
18 that failure to file objections within the specified time may waive the right to appeal the District
19 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: August 5, 2005.

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23 UNITED STATES MAGISTRATE JUDGE
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